

**IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MARYLAND**

**JEFF HULBERT, et al**

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**Plaintiffs**

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**v.**

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**Case No. 1:18-cv-00461-GLR**

**SGT. BRIAN T. POPE, et al**

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**Defendants**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

The Defendants, by and through their attorneys, submit the following points, authorities and arguments in support of their Motion to Dismiss filed in the above-captioned proceeding.

**I. INTRODUCTION**

1. This action is brought seeking injunctive relief and monetary damages based on allegations of Plaintiffs that the Defendants violated their constitutional rights of free speech under the First Amendment of the U.S. Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and retaliation, as well as their rights against unreasonable search and seizure and excessive force under the Fourth Amendment and Articles 24 and 26 of the Declaration of Rights. The Plaintiffs also allege common law tort claims of false arrest and false imprisonment. The Defendants are being sued in their official and individual capacities. The Complaint should be dismissed because the State of Maryland, through the Defendants in their official capacities, cannot be sued in Federal Court under the Eleventh Amendment to the U.S. Constitution, the Defendants in their individual capacities are entitled to qualified immunity in

the federal claims and immunity under Maryland law for the State claims. The Complaint otherwise fails to allege specific facts upon which relief can be granted.

2. The Plaintiffs Jeff Hulbert, a citizen of Maryland, and Kevin Hulbert, a citizen of Virginia, are brothers who are active in the debate over gun-control and issues related to the Second Amendment of the United States Constitution. The Plaintiff, Maryland Shall Issue, Inc. (“MSI”), is a non-profit membership organization incorporated under the laws of Maryland, for the purpose, as stated in the Complaint, for the preservation and advancement of gun-owners’ rights in the State of Maryland.

3. The Defendants are sued in their official and individual capacities. Both are members of the Maryland Capitol Police, a division of the Maryland Department of General Services (hereinafter referred to as “MCP”); Sergeant Brian Pope (“Pope”) is a non-commissioned officer in MCP with the regular law enforcement responsibilities of a police officer; Colonel Michael Wilson (“Wilson”) is the commander and head of unit of the entire MCP division.

## **II. FACTUAL ALLEGATIONS**

This case arises from an incident in which the Plaintiffs held an unpermitted and unscheduled demonstration on the sidewalk in front of Lawyers’ Mall in Annapolis, Maryland on February 5, 2018 in the evening approximately around 6:00 PM.<sup>1</sup>

The central allegations that form the basis of this suit are as follows:

(a) The Plaintiffs and the individuals accompanying them had gathered on the sidewalk in front of Lawyers’ Mall in Annapolis, Maryland on February 5, 2018 starting

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<sup>1</sup> Anyone planning to hold a demonstration or rally on the Capitol Building grounds are required to obtain a permit from the MCP and conduct it on Lawyers’ Mall pursuant COMAR 04.05.02.02.

approximately at 6:00 PM to protest firearm-related laws and policies that they opposed (See ECF 1 (Complaint) at ¶¶ 1, 2, 20, 21, 22, 23, 24 and 25).

(b) That the Plaintiffs and the other demonstrators stood on the sidewalk with signs

(See ECF 1 (Complaint) at ¶¶ 30 and 31).

(c) That Sergeant Pope first had advised Kevin Hulbert that the demonstration had to be in Lawyers Mall and about an hour later ordered the Plaintiffs and the other individuals accompanying them to move from the sidewalk into Lawyers' Mall (See ECF 1 (Complaint) at ¶¶ 27, 28, 29 and 32).

(d) That Jeff Hulbert "was the sole sign-holder who chose to stay behind in civil and respectful disobedience" of the order (See ECF 1 (Complaint) at ¶ 33).

(e) That Kevin Hulbert was at the same location videotaping the scene (See ECF 1 (Complaint) at ¶ 35)

(f) That additional officers arrived on the scene. (See ECF 1 (Complaint) at ¶ 34)

(g) That Sergeant Pope placed Jeff Hulbert and Kevin Hulbert under arrest for failure to obey a lawful order (¶See ECF 1 (Complaint) at ¶ 33, 35 and 38) and both were placed in handcuffs and taken to the Annapolis Police headquarters where the formal citations were given to them (See ECF 1 (Complaint) at ¶¶ 36, 37 and 38).

(h) That the initial charges (failure to obey a lawful to prevent a disturbance of the public peace) violated the Plaintiffs First Amendment right of freedom of speech and assembly as well as content-based retaliation for political messages contained on the signs being carried by the demonstrators (See ECF 1 (Complaint) at ¶¶ 43 and 44)

(i) That Chief Wilson retaliated against the Plaintiffs the following day for talking with the media about the incident by serving two additional citations (See ECF 1 (Complaint) at ¶¶ 45, 46, 47, 48, 49, 50, 51, 52 and 53).

(j) That the two additional citations charging the Plaintiffs for refusal to leave Lawyers' Mall which by doing so was acting in a manner disruptive of and disturbing the conduct of normal business in violation of §6-409(b) of the Criminal Law Article, Annotated Code of Maryland and Code of Maryland Regulations 04.04.01.03 (See ECF 1 (Complaint) at ¶ 54).

It is the Defendants position that the Plaintiffs fail to state a claim upon which relief can be granted in various Counts of the Complaint, as discussed below.

### **III. STANDARD OF REVIEW**

A complaint must demonstrate that the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2). When a complaint fails to state a claim upon which relief may be granted, dismissal is appropriate. Fed. R. Civ. P. 12(b)(6). In order to survive a motion to dismiss for failure to state a claim, a complaint must allege facts sufficient to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it contains factual content that allows the court to draw the reasonable inference that the defendants are liable for the alleged misconduct. *Id.* In reviewing a motion to dismiss under Rule 12(b)(6), the Court accepts all factual allegations in the complaint as true and draws all reasonable inferences from those facts in favor of the plaintiff. *Strickland-Lucas v. Citibank, N.A.*, 256 F. Supp. 3d 616, 621-22 (D. Md. 2017). Bald allegations and speculation, however, are insufficient to state a claim, and the Court is not required to accept legal conclusions drawn from the facts. *Id.*

#### IV. ARGUMENT

##### A. DEFENDANTS CANNOT BE SUED IN THEIR OFFICIAL CAPACITIES BECAUSE THEY ARE STATE ACTORS AND THE STATE IS NOT A “PERSON” UNDER §1983 AND THE STATE ENJOYS ELEVENTH AMENDMENT IMMUNITY.

State officials cannot be sued in their official capacities because they are State actors and the State cannot be sued under the Eleventh Amendment. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) The petitioner in *Wills* filed a §1983 claim against the Michigan State Police and the Director of State Police in state court because he had been denied a promotion. The Supreme Court of Michigan ruled that the defendants in that case were not “persons” under §1983. On certiorari from the state supreme court decision, the Supreme Court, in holding that neither the agency nor the director could be sued in their official capacities in a §1983 case, explained as follows:

“Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.... As such, it is no different from a suit against the state itself.... We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. We hold that neither a State nor its officials acting in their official capacities are “persons” under § 1983.” *Id.* at U.S. 71 (internal citations omitted).

Here, the Defendants are both employees of the MCP and as such are “state officials” when acting in their official capacity. The Complaint has been brought against both Defendants in both their official capacities and their individual capacities. To the extent

that the suit has been brought under 42 U.S.C. §1983, the claims against the Defendants in their official capacities are impermissible and should be dismissed.

Further, a federal court award of damages against a state, a state agency or an official sued in an official capacity is barred by the Eleventh Amendment. *Edelman v Jordan*, 415 U.S. 651 (1974). However, the Eleventh Amendment does not bar prospective relief against a state official to prevent future federal constitutional or statutory violations. *In re Young*, 209 U.S. 123 (1908). Nevertheless, the Plaintiffs seek in their §1983 claims to a large measure monetary awards against the Defendants in their official capacities which are clearly impermissible under the Eleventh Amendment. To the extent of those claims against the Defendants in their official capacities for monetary awards, they must be dismissed.

**B. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

“Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is ‘an entitlement not to stand trial or face the other burdens of litigation.’ (citation omitted). The privilege is ‘an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.’ (citation omitted). As a result, ‘we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’” *Saucier v. Katz*, 533 U.S. 194, at 200-201 (2001) (emphasis in original). The resolution of the issue of qualified immunity is of utmost importance in the early stages of litigation. For this reason, the Defendants seek qualified immunity in this preliminary motion.

Plaintiffs’ personal-capacity claims against Chief Wilson and Officer Pope are barred by qualified immunity. Government officials sued under 42 U.S.C. § 1983 are immune from suit

unless their conduct fails to pass a two-prong test, namely, (1) it violates a constitutional right, *and* (2) the unlawfulness of their conduct was clearly established at the time of the violation. *District of Columbia v. Wesby*, \_\_\_\_ U.S. \_\_\_, 138 S. Ct. 577, 589 (decided Jan. 22, 2018). See also, *Pearson v Callahan*, 555 U.S. 223 (2009); To be clearly established for qualified-immunity purposes, a rule must be sufficiently clear that “*every* reasonable official would understand that what he is doing is unlawful.” *Wesby*. *supra* (emphasis added; internal quotation marks omitted). The existing law must place the unconstitutionality of the official “beyond debate.” *Id.* (internal quotation marks omitted). The clearly-established standard is “demanding,” and protects “all but the plainly incompetent or those who knowingly violate the law.” *Id.* (emphasis added).

Whether or not a rule is clearly established is determined by reference to existing law at the time of an alleged violation. A legal principle is not clearly established unless it has “a sufficiently clear foundation in then-existing precedent” or is “dictated by controlling authority or a robust consensus of cases of persuasive authority.” *Id.* at 589-90 (internal quotation marks omitted). “It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that *every* reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.” *Id.* at 590 (emphasis added). Moreover, a legal principle must clearly apply under the specific factual circumstances of a given case. “The rule’s contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.” *Id.* (internal quotation marks omitted).

In the First Amendment context, a legal principle is not “clearly established”—even if a court ultimately agrees with it—if a government official could reasonably have a different view of the law: “It does not matter” whether a plaintiff actually possesses a right he claims to

possess; “[w]hat matters is that reasonable government officials could . . . understand the law very differently.” *Occupy Nashville v. Haslam*, 769 F.3d 434, 445 (6th Cir. 2014).

Plaintiffs have failed to state a claim as to Chief Wilson and Officer Pope individually because they fail to allege, beyond bald assertion, facts that show (1) how being ordered to move back from the sidewalk into Lawyers’ Mall to continue their demonstration was a violation of their First Amendment rights of free speech and assembly; (2) how the actions of the Defendants were outside the realm of settled authority when the orders were given, the arrests were made and the citations were given to Jeff and Kevin Hulbert.

The Mall is part of the General Assembly Building complex and is owned by the Department of General Services (“DGS”). The MCP is a part of DGS which is charged with the responsibility of protecting the grounds and buildings. See State Fin. & Proc. Art., §§ 4-601, 4-604 and 4-605, Annotated Code of Maryland. This is important because the Defendants were acting in accordance with statutory law and not upon their own authority.

When the Complaint is carefully read, there is no factual allegation that the Plaintiffs and the accompanying demonstrators were deprived of their First Amendment Rights of free speech. The allegations clearly show that Officer Pope had ordered the demonstrators to move back from the sidewalk in front of Lawyers’ Mall into the Mall area. In reading paragraphs 27, 28, 29 and 32 together, it is clear that Officer Pope ordered Kevin Hulbert, Jeff Hulbert and those accompanying them to move back into the area of Lawyers’ Mall. The physical layout and location of the sidewalk in relation to the Mall as described in Paragraph 28 of the Complaint makes clear that the demonstrators were being ordered to move a distance of a matter of feet. Contrary to the allegation that the police “ordered them away” in paragraph 1, it is clear that Officer Pope had first told Kevin Hulbert and later Jeff Hulbert and the other demonstrators with

him to move back from the sidewalk into Lawyers' Mall. It is clear from paragraph 32 that all the demonstrators heard the order because the other demonstrators, besides the Hulbert brothers, began to move toward Lawyers' Mall. Whether the demonstrators had a permit to go into Lawyers' Mall is irrelevant because Officer Pope was clearly giving them permission by his order to go inside the Mall area. From there, the Plaintiffs could continue their demonstration within feet from where they were located previously, and in view of pedestrians and oncoming traffic. Consequently, the Plaintiff free speech rights were not violated thus clearing the first prong of entitlement to qualified immunity enunciated in *Wesby*.

Assuming *arguendo* that the order and arrest violated a constitutional right, the Defendants would be entitled to qualified immunity unless the unlawfulness of their actions were clearly established at the time. Here, Officer Pope was confronted by a group of demonstrators who were carrying on a demonstration on the sidewalk before the General Assembly Building in front of Lawyers' Mall. Officer Pope, as an officer of MCP, is sworn to enforce COMAR 04.05.01.02 as well as COMAR 04.05.03, regarding the proper use of sidewalks on DGS owned property<sup>2</sup>. These regulations have not been challenged on constitutional grounds and, therefore,

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<sup>2</sup> COMAR 04.05.01.02 provides as follows:

- A. The property is closed to the public after regular business hours.
- B. Property or portions of it may be closed to the public during regular business hours in emergency situations:
  - (1) Necessary to the orderly conduct of State business;
  - (2) For safety reasons; or
  - (3) For security reasons.
- C. After consulting with the Secretary of General Services, or in the Secretary's absence, the Deputy Secretary, emergency situations may be declared by the following individuals, or by their authorized designee:
  - (1) Superintendent of Baltimore Public Buildings and Grounds;
  - (2) Superintendent of Annapolis Public Buildings and Grounds; or the
  - (3) Manager of a multiservice center.

would lead a public officer to reasonably believe that the enforcement of them would not violate a constitutional right. Taking into consideration the specific situation where Officer Pope found himself, there was no clearly established authority holding that a public official violates a demonstrator's First Amendment rights by ordering that person to move within a few feet from where the demonstrator was originally standing. See *Ross v. Early*, 746 F. 3d 546 (4<sup>th</sup> Cir. 2014) where a police officer was found to be entitled to qualified immunity from suit for his arrest of a protester on a public sidewalk after failing to obey an order to move to designated area of sidewalk during a public event. The officer, in arresting the protester, was enforcing a City ordinance which provided designated areas for exercise of speech rights that would free the flow of pedestrian traffic during events at the Baltimore Arena. Since the ordinance had not been previously challenged, the court said that the officer could reasonably believe that he was not violating a settled constitutional right. In this case, Officer Pope in enforcing DGS regulations, could reasonably believe that his order in light of the circumstances would not violate the

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D. During and after business hours or during declared emergency situations, an individual working, visiting, conducting business, or otherwise lawfully in, on, or about State property will be required to display identification documents upon request. During and after business hours or during declared emergencies, an individual may be arrested if the individual:

- (1) Either:
  - (a) Is on the property with no apparent lawful business to pursue; or
  - (b) Fails to display identification documents upon request; and
- (2) Refuses to leave or fails to leave after being asked to leave by an authorized employee of the Department of General Services.

COMAR 04.05.01.03 provides in pertinent part:

A. An individual shall be subject to arrest if the individual:

- (5) Obstructs:

- (b) Walks,

The Complaint does not challenge the constitutionality of these regulations.

demonstrators' First Amendment rights. Consequently, Officer Pope would be entitled to qualified immunity under Counts I and II.

The Complaint does not allege that Chief Wilson took part in the ordering of the demonstrators back from the sidewalk into Lawyers' Mall. Because the doctrine of *respondeat superior* does not apply in actions brought under § 1983, *see Barnes v. Wilson*, 110 F. Supp. 3d 624, 630 (D. Md. 2015), Plaintiffs' failure to allege any conduct by Chief Wilson is a basis for dismissing the individual-capacity claims against him outright or entitle him to qualified immunity in Counts I and II.

The allegations of Count III, that the Defendants Wilson and Pope cited the Hulbert brothers under separate statute and regulation were in retaliation for the brothers speaking to the media are without merit. In the First Amendment retaliatory arrest context, a governmental official is immune from a § 1983 suit if his conduct passes the same tests enunciated in *Wesby, supra*. See *McCoy v. City of Columbia*, 929 F. 2d 541, 562 (4<sup>th</sup> Cir. 2013). In paragraphs 85 and 86 of the Complaint, the Plaintiffs allege that Wilson and Pope without probable cause caused additional charges to be cited against them. However, the citations stem from the same incident that transpired the night before when Officer Pope made the arrests and issued the original citations to the Hulbert brothers. The citations on their face show the same facts on the same date as the original citations (ie: failing to obey the order to move from the sidewalk to inside Lawyers' Mall) which is the probable cause for their issuance the following day. See copies of the citations signed by the Hulbert brothers on February 5, 2018, referenced in the Complaint, attached hereto and made a part hereof as Exhibits A. 1 and 2, and copies of citations signed by the Hulbert brothers the following day attached hereto and made a part hereof as Exhibits B 1 through 4. The allegations in Paragraph 38 infer that the citations signed by the Hulberts on

February 5th were incomplete in that it merely cited a CJIS code. The facts given however were materially the same between the citations signed by the Hulbert brothers on February 5<sup>th</sup> and the ones signed by them the following day. It is apparent that the second set of citations were to correct the incompleteness of the first set based on the same arrest. The service of the second set of citations was a necessary step to properly cite the Plaintiffs for their conduct the evening before. As argued above, the order and arrest which led to the first set of citations were done in the reasonable belief that it did not violate an established rule of law. The service of the corrected second set of citations was an extension of enforcing the regulations previously done the night before. There was no settled authority to lead either Defendant to believe that serving the corrected citations would violate a constitutional right. Therefore, both Defendants are entitled to qualified immunity as to Count III and the same Count should be dismissed.

Count IV alleges Fourth Amendment unconstitutional search and seizure.

“The Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ Because arrests are ‘seizures’ of ‘persons’, they must be reasonable under the circumstances. [citations omitted] A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer’s presence” *Wesby*, at S. Ct. 585 and 586 [quotes in original]. To determine whether an officer had probable cause to make an arrest, “‘we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause’” *Id.* (internal quotes omitted). “Because probable cause ‘deals with probabilities and depends on the totality of the circumstances, it is ‘a fluid concept’ that is ‘not readily, or even usefully, reduced to a neat

set of legal rules.’ It ‘requires only a probability or substantial chance of criminal activity, not an actual showing of such activity’ Probable cause ‘is not a high bar.’” *Id.* (citations omitted)

In the Fourth Amendment context, the same standards for qualified immunity apply as in the First Amendment context, ie: unless an arrest (1) violates a constitutional right, *and* (2) the unlawfulness of the officer’s conduct was clearly established at the time of the violation. *Id.* at S. Ct. 589. As was argued above in the First Amendment context, precedent must be clearly established so that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply and the rule’s contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

It has already been argued above that Officer Pope had warned and ordered the Plaintiffs and the other demonstrators with them not to demonstrate on the sidewalk, but to move back a few feet inside of Lawyers’ Mall and continue with their demonstration there. This order was to enforce the COMAR regulations cited above regarding the use of sidewalks. In so doing, the Plaintiffs would not in any way be deprived from exercising their rights of free speech. The other demonstrators understood the order and began to move back into Lawyers’ Mall while the Hulbert brothers defied the order after it had been given. Officer Pope, while present at the scene, saw that the Hulbert brothers were willfully defying his order to move their demonstration into Lawyers’ Mall. Officer Pope’s witnessing the brothers’ defiance of his order constituted probable cause that led to the arrest. Therefore, the arrests made of the Hulbert brothers were a valid warrantless arrest or “seizure” of their persons based upon probable cause. Thus, Officer Pope’s arrest did not constitute an unlawful Fourth Amendment search and seizure and his reasons for making the arrest did not violate any established principle of law at the time. He would therefore be entitled to qualified immunity under *Wesby*.

For these reasons, Officer Pope would be entitled to qualified immunity in Count IV.

Further, the Complaint fails to allege that Chief Wilson was present at the time of the arrests on February 5<sup>th</sup> or that he would be liable as a supervisor. The Fourth Circuit has set forth three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed “a pervasive and unreasonable risk” of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show “deliberate indifference to or tacit authorization of the alleged offensive practices,”; and (3) that there was an “affirmative causal link” between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff , *Shaw v. Stroud*, 13 F.3d 791 (4<sup>th</sup> Cir. 1994), cert. den. 513 U.S. 813, 814 (1994). From what is inferred from the Complaint, Chief Wilson was not aware of the arrest, nor were there any allegations that Chief Wilson would have known that Officer Pope would make arrests without probable cause. Therefore, Chief Wilson would not have plausible liability.

The Complaint does not make a clear allegation that the issuance of citations on February 6<sup>th</sup> constituted an arrest, but to the extent that it infers that an unconstitutional arrest was also made, such allegation would fail because the mere issuance of a citation by either Officer Pope or Chief Wilson without any attendant restraint on the individual’s freedom is not a seizure under the Fourth Amendment. *Martinez v Carr*, 479 F.3d 1292 (10<sup>th</sup> Cir. 2007); *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3d Cir. 2005). Therefore, Chief Wilson is entitled to qualified immunity to Counts IV and V.

Count V alleges Fourth Amendment unconstitutional excessive force.

The starting point for any constitutional claim of excessive force is the Supreme Court's opinion in *Graham v. Connor*, 490 U.S. 386, 396 (1989). The *Graham* Court held that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* The test for reasonableness is an objective one: “the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* The Maryland Court of Appeals adopted the *Graham* reasonableness standard for evaluating excessive force claims brought pursuant to the Maryland Declaration of rights. See *Richardson v. McGriff*, 361 Md. 437, 452-53 (2000); see also *Randall v. Peaco*, 175 Md. App. 320, 329 (2007) (applying *Graham* and *Richardson* reasonableness standard to a summary judgment determination). Therefore, both the § 1983 Fourth Amendment claim (Count V) and the Maryland Declaration of Rights claims (Counts VII and VIII) can be analyzed pursuant to the *Graham* reasonableness standard. .<sup>3</sup>

The Supreme Court has recognized that the right to make an arrest carries with it the right to use the force necessary to make the arrest. In *Graham*, the Court noted that “[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham*, 490 U.S. at 396. The Supreme Court explained the reasoning behind this as follows:

Every arrest must be presumed to present a risk of danger to the arresting officer. There is no way for an officer to predict reliably how a particular subject will

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<sup>3</sup> The standard for a 14<sup>th</sup> Amendment claim imposes a higher burden on Plaintiff, as discussed below. But given that Plaintiff fails to assert a plausible claim under the 4<sup>th</sup> Amendment, the Defendants are entitled to dismissal of the 14<sup>th</sup> Amendment claim as well.

react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious.

*Washington v. Chrisman*, 455 U.S. 1, 7 (1982).

Handcuffing is certainly part of the force reasonably used to effect a lawful arrest and the law is clear that handcuffing suspects who have been lawfully arrested rarely amounts to excessive force. The Fourth Circuit has said that “a standard procedure such as handcuffing would rarely constitute excessive force where the officers were justified ... in effecting the underlying arrest.”

*Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002). In this case, Officer Pope found himself confronted with several demonstrators at the scene. He was also confronted with the two Hulbert brothers willfully defying his order to move back a few feet into Lawyers’ Mall. This defiance could be reasonably interpreted by Officer Pope as an indicator that the situation could become volatile. Fortunately, it did not turn out to be volatile, but Officer Pope at the moment of arrest could not be certain what the next minutes would bring. Under this set of circumstances, it can be seen that Officer Pope’s use of handcuffs was reasonable. The Plaintiffs did not allege any injury to themselves that would indicate excessive use of force.

Where there is no allegation of physical injury, the handcuffing of an individual incident to a lawful arrest is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment. *Neague v. Cynkar*, 258 F.3d 504 (6<sup>th</sup> Cir 2001). The Plaintiffs allege that they were both “placed painfully in tight handcuffs and searched before being taken to the Annapolis City Police precinct”, but nowhere is there any allegation of any physical injury inflicted upon them. Since physical injuries are not so much as alleged in the Complaint, it is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment or Article 26 of the Declaration of Rights of the Maryland Constitution. Having not even stated a

claim upon which relief can be granted in Count V there is no reason to analyze whether the Defendants are entitled to qualified immunity. Even so, Officer Pope used only reasonable force to arrest the Hulbert brothers which inflicted no injury, thus not violating the Hulbert brothers' Fourth Amendment right against the use of excessive force. Chief Wilson is not even alleged to have taken part in the arrest. Therefore, Counts V and VIII should be dismissed outright as to both Defendants.

**C. CHIEF WILSON AND OFFICER POPE ARE ENTITLED TO STATUTORY STATE PERSONNEL IMMUNITY FOR STATE LAW CLAIMS, AND THE STATE HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FOR STATE LAW CLAIMS BROUGHT IN FEDERAL COURT.**

When an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are the nominal defendants. *Edelman v Jordan, supra*, at U.S. 663. The Plaintiffs' State law rights in Counts VI through X also seek to a large extent monetary awards against the Defendants in their official capacities that effectively constitutes a suit against the State which is impermissible under the Eleventh Amendment. To the extent of those claims against the Defendants in their official capacities for monetary awards, they must be dismissed on Eleventh Amendment grounds.

The Defendants' entitlement to immunity in the State constitutional and tort claims come under a Maryland Tort Claims Act analysis.

Under the Maryland Tort Claims Act (Title 12, subtitle 1 of the State Government Article, Annotated Code of Maryland), state personnel shall have the immunity from liability described under §5-522(b) of the Courts and Judicial Proceedings Article. *State Gov. §12-105*.

Section 5-522(b) of Courts and Judicial Proceedings Article provides:

“State personnel, as defined in § 12-101 of the State Government Article, are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article, even if the damages exceed the limits of that waiver.”

The Court of Appeals of Maryland has held that the immunity under the Maryland Tort Claims Act, if otherwise applicable, encompasses constitutional torts and intentional torts. *Lee v. Cline*, 384 Md. 245 (2004). “The immunity under the Maryland Tort Claims Act, however, is not inherently related to negligence actions in contrast to intentional tort actions. The purpose of the Tort Claims Act's immunity is not simply to protect judgmental decisions by officials. Instead, the purpose of the Tort Claims Act's immunity is to insulate state employees generally from tort liability if their actions are within the scope of employment and without malice or gross negligence. This broader purpose fully applies to non-malicious intentional torts and constitutional torts.” *Id.* at Md. 261.

Thus, the question is whether the alleged violations of the Defendants were acts done within the scope of their public duties and were done without malice or gross negligence.

On February 5<sup>th</sup>, Officer Pope was working on duty as a sworn officer of MCP. As explained above, part of his duties as an officer is to enforce DGS regulations governing the use and security of grounds and buildings in its jurisdiction. COMAR 04.05. 01.02 as well as COMAR 04.05.03 are among those regulations which calls for the walks and areas around the building not be obstructed. As argued above, Officer Pope encountered the Plaintiffs and the

other demonstrators in the sidewalk area close to the street and had ordered them to move a few feet away into Lawyers' Mall. The order was made to enforce the COMAR regulations above cited and thus was a lawful order. The order did not require the group to cease their demonstration or disrupt their exercise of free speech. Actual malice in Maryland law normally refers 'to conduct characterized by evil or wrong motive, intent to injure, knowing or deliberate wrongdoing, ill-will or fraud...' *Id.* at Md. 268. Officer Pope, from a careful reading of the allegations of the Complaint clearly did not interfere with the Plaintiffs' free-speech rights. The allegations were that Officer Pope ordered the demonstrators to move a few feet and did not order them to disperse. From the conduct of Officer Pope, it cannot be inferred that Chief Wilson had malice to disperse the demonstration. For the same reasons, it is difficult to find that either Defendants had been grossly negligent towards the Plaintiffs' free speech rights when those speech rights were not infringed upon. Thus, both Defendants should be entitled to immunity in Count VI.

If Officer Pope did not act out of malice or operated from gross negligence by violating the Plaintiffs' free speech rights, then it would follow that the arrest and handcuffing did not flow from malice or gross negligence either. As seen, Officer Pope did not give the orders to the group to move into Lawyers' Mall out of malice or gross negligence and the order was lawfully given. The Hulbert brothers' willful failure to obey the order required the next step of arrest. The fact that an arrest was made and the arrestee is handcuffed is not in itself a sign of malice. Further, the Plaintiffs were not injured while in handcuffs which would give further indication that Officer Pope did not act with malice or with gross negligence. Therefore, Officer Pope would be entitled to immunity in Counts VII and VIII.

The Complaint does not allege that Chief Wilson took part in the ordering of the demonstrators back from the sidewalk into Lawyers' Mall or the making of the arrest. Consequently, he would not be liable for the Article 24 and 26 claims in Counts VII and VIII.

The Plaintiffs claim that they were falsely arrested and falsely imprisoned by the Defendants under State law concepts. In *Prince George's County v. Blue* 206 Md. App. 608 (2012), aff'd in *Blue v. Prince George's County*, 434 Md. 681 (2013), the court held that if probable cause existed for an arrest, then legal justification for the arrest and imprisonment existed so as to preclude claims for false arrest and false imprisonment. In *Blue*, the plaintiff worked at a nightclub and carried a firearm without a license. He went outside of the nightclub to investigate a shooting on the parking lot. The police, when they arrived, found that he had the firearm on his person and ultimately arrested him. The plaintiff filed an action against the county claiming a violation of his rights under Article 24 of the Maryland Declaration of Rights as well as counts for false arrest and false imprisonment. The jury found for the Plaintiff on all counts and the county moved for judgment *n.o.v.* which motion was denied. The county appealed and the Court of Special Appeals in reversing the trial court said that the legal justification to arrest precludes claims for false arrest and false imprisonment. In that it has already been demonstrated that Officer Pope had justification for the arrests, Counts IX and X should be dismissed as to him.

With that said, even if Counts IX and X are not dismissed, for the same reasons discussed above regarding immunity to Counts VII and VIII, there is no showing of malice or gross negligence as to Counts IX and X so that Officer Pope would be entitled to immunity under the Maryland Tort Claims Act. The allegations fail to allege sufficient facts to show how Chief

Wilson took part in the false arrest and false imprisonment of the Plaintiffs and therefore Counts IX and X should be dismissed as to him.

For the foregoing reasons, all Counts should be dismissed outright or dismissed as to both Defendants because they are entitled to qualified immunity in the federal claims and immunity under the Maryland law in the State claims.

Respectfully submitted,

BRIAN E. FROSH, Attorney General of  
Maryland

/s/  
Robert A. McFarland, Assistant Attorney  
General, Department of General Services  
Federal Bar No. 10095  
300 W. Preston Street, Room 608  
Baltimore, MD 21201  
(410) 767-4514  
robert.mcfarland@maryland.gov

**EXHIBIT A.1**

(Citation to Kevin Hulbert Signed Feb. 5, 2018)



**UNIFORM CRIMINAL CITATION  
State of Maryland vs.**



172003406643

Defendant's (Last) Name  
**Hulbert**

FIRST  
**James**

Middle  
**James**

Current Address in Full  
**Po Box 41**

CITY  
**Dick Hall** County  
**VA** State  
**23416** Zip Code  
DOB  
**10-7-53** Height  
**5'10** Weight  
**175** Sex  
**M** Race  
**W** Ethnicity  
**White** Hair  
**Grey** Eyes  
**Blue**  
Related Citations  
**122001069260** Telephone No.  
**7578245639** Night:  
Day:

Arrest Number (if applicable)  
**122001069260**

Check if Fingerprinted

It is formally charged that the above named person on **5 February 2018** Year  
at **7-20 Lawyer's Walk - Public sidewalk** Location  
**Fallafel's** City/County, Maryland did  
**willfully fail to obey a reasonable and**  
**lawful order of a law enforcement officer**  
**knowingly made for prevent a disturbance**  
**for the public peace**

In violation of:  Md. Ann. Code    COMAR/Agency Code    Common Law of Md.    Ordinance  
 Public Local Law

Document/Article  
Section  
CJIS Code

Penalty  
**\$500**   **60 Days**

TO ANSWER THE ABOVE CHARGE LODGED AGAINST YOU:  
YOU ARE HEREBY SUMMONED AND COMMANDED TO APPEAR FOR TRIAL IN THE DISTRICT COURT OF MARYLAND FOR **Fallafel's** (CITY/COUNTY) LOCATED AT

ON \_\_\_\_\_ AT \_\_\_\_\_  
 WHEN REQUIRED BY THE COURT. Date \_\_\_\_\_

**YOUR FAILURE TO OBEY THIS CITATION MAY RESULT IN THE ISSUANCE  
OF A WARRANT FOR YOUR ARREST.**

To request a foreign language interpreter or a reasonable accommodation under the Americans with Disabilities Act, please contact the court immediately.

I sign my name as a receipt of a copy of this citation and not as an admission of guilt. I hereby submit to the jurisdiction of the Court.

X Defendant's Signature

*James Hulbert*  
Signature  
Date \_\_\_\_\_  
Attenuity \_\_\_\_\_  
Sub-Attenuity \_\_\_\_\_  
ID No. \_\_\_\_\_  
DC-CR-JM5 Rev 07/2017

## EXHIBIT A.2

(Citation to Jeff Hulbert Signed Feb. 5, 2018)



**UNIFORM CRIMINAL CITATION**  
State of Maryland vs.



172003406654

Defendant's (Last) Name Holbert Jeff William  
 First Middle  
 Current Address in Full PO Box 137301 Tuckercircle

City Chester County MD State MD Zip Code 21619  
 DOB 10-7-53 Height 5'10 Weight 200 Sex M Race White Ethnicity White  
 Hair Grey Eyes Blue  
 Related Citations 172003406643 Telephone No.   
 Day: 11/14 Night:

Arrest Number (if applicable) 172003406643 Check if Fingerprinted

It is formally charged that the above named person on 5 September 2017 Year  
 at J'DeP Lawyer's Park Public Work City/County, Maryland did  
fail to obey a reasonable and lawful order of a law enforcement officer  
to wit make to present a disturbance  
to the public peace

In violation of:

Md. Ann. Code    COMAR/Agency Code    Common Law of Md.    Ordinance  
 Public Local Law

Document/Article

Section

CJIS Code

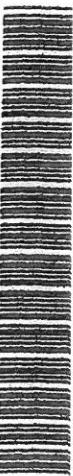
**EXHIBIT B.1**

(Citation to Kevin Hulbert Signed Feb. 6, 2018

**CR 6-409(b))**



**UNIFORM CRIMINAL CITATION**  
122001069271



State of Maryland vs.

Defendant's (Last) Name

First

Middle

HulbertKevinJames

Current Address in Full

PO BOX 611

City

Chek Hall5/10175MW6'7"GrayBlue23416Zip Code10-753HeightWeightSexRaceHairEyes

Related Citations

102001069282(75)24-563Night:Day:5 Feb 2018A.D.20 p.m.Mat. Lawyer's HallSidewalk Public

It is formally charged that the above named person on 5 Feb 2018 at 7:20 p.m. Mat. Lawyer's Hall Sidewalk Public (Location) did refuse to leave Lawyer's Hall a property of State of Maryland public agency during regular business hours upon being requested to do so by Sgt. Park and when the defendant was acting in a manner disruptive of and disturbing to the conduct of normal business.

In violation of:  Md. Ann. Code  COMAR / Agency Code  Common Law of Md.  Ordinance  
 Public Local Law

Document(Article)	Section	CJIS Code
<u>CR 6-409 (b)</u>		<u>1-0344</u>

Penalty: \$100,16 months

TO ANSWER THE ABOVE CHARGE LODGED AGAINST YOU:  
 YOU ARE HEREBY SUMMONED AND COMMANDED TO APPEAR FOR TRIAL IN THE DISTRICT COURT OF MARYLAND FOR APR 10, 2018 (CITY/COUNTY) LOCATED AT 5800, MARYLAND

 ON

WHEN NOTIFIED BY THE COURT. Date

AT

M.

YOUR FAILURE TO OBEY THIS CITATION MAY RESULT IN THE ISSUANCE

OF A WARRANT FOR YOUR ARREST.

To request a foreign language interpreter or a reasonable accommodation under the Americans with Disabilities Act, please contact the court immediately.

I sign my name as a receipt of a copy of this citation and not as an admission of guilt. I hereby submit to the jurisdiction of the Court and agree to appear when notified.

X Defendant's Signature Kevin Hulbert

I solemnly affirm under the penalties of perjury that the contents of the foregoing citation are true to the best of my knowledge, information, and belief.

Officer's

Signature Kevin Hulbert

Date

Agency

Sub-Agency

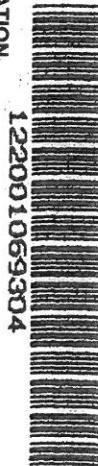
ID No.

## EXHIBIT B.2

(Citation to Kevin Hulbert Signed Feb. 6, 2018  
COMAR 04.05.01.03)



**UNIFORM CRIMINAL CITATION**



122001069304

Defendant's (Last) Name Kyle James

First Kyle

Middle James

Current Address in Full P.O. Box 41

City Oak Hall

State MD

Zip Code 23416

DOB 10-25-3

Height 5'10

Weight 175

Sex M

Race White

Hair Grey

Eyes Blue

Telephone No. 767-924-3639

Day: \_\_\_\_\_ Night: \_\_\_\_\_

Year: \_\_\_\_\_

Location: \_\_\_\_\_

Related Citations 172003406654

Day: \_\_\_\_\_ Night: \_\_\_\_\_

Year: \_\_\_\_\_

Location: \_\_\_\_\_

It is formally charged that the above named person on 5 February 2018

at P.O. f Mat. Lawyer's Hall - Side Walk R.R.

City/County, Maryland  
old theater's distortion the general public

from obtaining services provided in the  
property, or obstructs works

In violation of:  Md. Ann. Code  COMAR / Agency Code  Common Law of Md.  Ordinance  
 Public Local Law

Document/Article	Section	CJIS Code
<u>04.05.01.03</u>		

Penalty Kid Jenner and will be fined or imprisoned

TO ANSWER THE ABOVE CHARGE LODGED AGAINST YOU:

YOU ARE HEREBY SUMMONED AND COMMANDED TO APPEAR FOR TRIAL IN THE DISTRICT COURT OF MARYLAND FOR Montgomery Co. (CITY/COUNTY) LOCATED AT 530, MARYLAND

ON 4/10/18 AT ....., MARYLAND

WHEN NOTIFIED BY THE COURT. Date ..... AT ....., MARYLAND

**YOUR FAILURE TO OBEY THIS CITATION MAY RESULT IN THE ISSUANCE  
OF A WARRANT FOR YOUR ARREST.**

To request a foreign language interpreter or a reasonable accommodation under the Americans with Disabilities Act, please contact the court immediately.

I sign my name as a recipient of a copy of this citation and not as an admission of guilt. I hereby submit to the jurisdiction of the Court and agree to appear when notified.

X Defendant's Signature Kyle James

I solemnly affirm under penalties of perjury that the contents of the foregoing citation are true to the best of my knowledge, information and belief.

Officers

Signature B. P.

Date 4/10/18 Agency MCP Sub-Agency 000 ID No. 0160

**EXHIBIT B.3**

(Citation to Jeff Hulbert Signed Feb. 6, 2018  
CR 6-409(b))



**UNIFORM CRIMINAL CITATION**  
State of Maryland vs.



122001069260

Defendant's (Last) Name Hilbert Jeff William First Middle  
 Current Address in Full Po Box 137301 Tackle Circle

City Chester State MD Zip Code 21619  
 DOB 10-7-53 Height 5'10 Weight 200 Sex M Race White Hair Gray Eyes Blue  
 Related Citations 122001069271 Telephone No.  
 Day: 11/6 Night:

It is formally charged that the above named person on 5 February 2018 at 7:30 P.M. Lawyer's Hall, S. Ab wole, 10th

did refuse to leave Lawyer's Hall, the office of the State of Maryland a public agency during regular business hours for being requested to do so by Sgt. Lopez and when defendant was acting in a manner disruptive of and disturbing to the conduct of normal business.

In violation of:  Md. Ann. Code  COMAR / Agency Code  Common Law of Md.  Ordinance  
 Public Local Law

Document/Article C.R. 6-109(6) Section 1-0344 CJIS Code 1-0344  
 Penalty: \$1 000 / 6 months

TO ANSWER THE ABOVE CHARGE LODGED AGAINST YOU.

YOU ARE HEREBY SUMMONED AND COMMANDED TO APPEAR FOR TRIAL IN THE DISTRICT COURT OF MARYLAND FOR Taylor R. Hilbert, D.S. (CITY/COUNTY) LOCATED AT 5100 MARYLAND

ON

WHEN NOTIFIED BY THE COURT. Date

AT \_\_\_\_\_ M.

**YOUR FAILURE TO OBEY THIS CITATION MAY RESULT IN THE ISSUANCE  
OF A WARRANT FOR YOUR ARREST.**

To request a foreign language interpreter or a reasonable accommodation under the Americans with Disabilities Act, please contact the court immediately.

I sign my name as a receipt of a copy of this citation and not as an admission of guilt. I hereby submit to the jurisdiction of the Court and agree to appear when notified.

Officer's Signature

J.W.H. 6 Feb 18 MHP 2002 8160  
 Signature

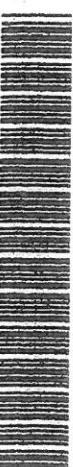
**EXHIBIT B.4**

(Citation to Jeff Hulbert Signed Feb. 6, 2018  
COMAR 04.05.01.03)



## UNIFORM CRIMINAL CITATION

122001069282



State of Maryland vs.

Defendant's (Last) Name HulbertFirst JeffMiddle WilliamCurrent Address in Full Po Box 137301 Tackle CreekCity ChesterState MarylandZip Code 21619DOB 10-7-53Height 5'10Weight 200Sex MRace WhiteHair BlondeEyes BlueTelephone No. (410) 322-0114Day: 10/14Night: Related Citations 122001069304Date 12/20/2018Year 2018Location 7-20 Lawyer's Hall - Sidewalk Publicnear AnnapolisCity/County, Maryland Annapolis

It is formally charged that the above named person on 3 February 2018 at 7-20 Lawyer's Hall - Sidewalk Public <sup>near Annapolis</sup> did disturb the general public <sup>(Location)</sup> from obtaining services provided on the property; or obstructs walks.

In violation of:

- Md. Ann. Code  COMAR / Agency Code  Common Law of Md.  Ordinance  
 Public Local Law

Document/Article 04-05.01.03

Section

CJIS Code

Penalty: MISDEMEANOR AND MAY BE FINED OR IMPROSONED

TO ANSWER THE ABOVE CHARGE LODGED AGAINST YOU:  
 YOU ARE HEREBY SUMMONED AND COMMANDED TO APPEAR FOR TRIAL IN THE DISTRICT COURT OF MARYLAND FOR Annapolis (CITY/COUNTY) LOCATED AT S 300 Maryland Ave, MARYLAND

 ONWHEN NOTIFIED BY THE COURT. Date AT 

M.

YOUR FAILURE TO OBEY THIS CITATION MAY RESULT IN THE ISSUANCE OF A WARRANT FOR YOUR ARREST.

To request a foreign language interpreter or a reasonable accommodation under the Americans with Disabilities Act, please contact the court immediately.

I sign my name as a receipt of a copy of this citation and not as an admission of guilt. I hereby submit to the jurisdiction of the Court and agree to appear when notified.

X Defendant's Signature Jeff Hulbert

I solemnly affirm under the penalties of perjury that the contents of the foregoing citation are true to the best of my knowledge, information, and belief.

Officer's

Signature John W. HulbertDate 10/14/2018Agency District of Columbia Police DepartmentSub-Agency ID NO.